IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 324 OF 2006
IN
STAMP NUMBER 2332 OF 2006

Children's Rights in Goa
having its office at
F5 Meera Building
Santa Inez Panaji Goa.
Represented by Director
Ms. Venicia Cardozo
Residing at HIG,
52 Housing Board Colony
Porvorim-Bardez, Goa. ... Applicant

versus

1. Shri Arun Sinha major
   S/o Late Sant Saran
   Prasad Editor Navhind
   Times Publications Ltd.,
   Ismail Gracious Road,
   Panaji Goa
   Residing at Cruz Bldg.
   S-1 B-7, near Red Rosary
   High School, Miramar
   Panaji-Goa.

2. The State of Goa
   Through the Public Prosecutor
   Attached to Mumbai High Court
   at Panaji. ... Respondents

Mr. Arun Bras De Sa, Advocate for the Applicant.

Mr. M. S. Usgaonkar, Senior Advocate with Mr. Sudesh Usgaonkar, Advocate for the Respondent No.1.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 14TH/15TH DECEMBER,2006.

ORAL ORDER

The applicant is an organization registered under Societies Registration Act and is before this Court in revision to assail the Order dated 7-4-2006 of the learned Children's Court by which the learned Children's Court for the State of Goa, has discharged the accused under Section 354 I.P.C. and Section 7 (5)(c) and Section 8(2) of the Goa Children's Act, 2003, as the State, at whose behest the charge-sheet was filed has chosen not to assail the said Order, and, on account of delay in filing the said revision has also filed an application for condonation of delay.

2. On behalf of the State, the learned Public Prosecutor

Ms. Winnie Coutinho has made a statement that the State has not desired to challenge the said Order of the Children's Court dated 7-4-2006.

3. The applicant claims that they are working for the welfare of children in Goa and their activities are directed for the protection of the children and their rights within the State of Goa. It is stated that they are working to see that the growth and happiness of the children is not interfered with by anybody and the applicant through its Office bearers intervenes and takes steps for protecting the children whenever and wherever they require protection and to see that their rights, happiness, wellbeing and welfare are not adversely affected or prejudiced by anyone from any quarters.

4. In the application for condonation of delay filed on behalf of the applicant, the applicant has stated that the State/Respondent No.2 not having filed any appeal/revision against the impugned Judgment nor having taken steps to file the same, the applicant had called upon the State, through its Counsel, the concerned functionaries namely the Chief Secretary,

the Law Secretary, Director General of Police, etc. of the State of Goa to file the said appeal but the State has not moved in the matter till date against the impugned Order given by the Children's Court. The applicant has therefore sought for condonation of delay in filing the application dated 25-8-2006.

5. At present, there is no dispute that the victim girl whose age has been assessed as 14 years and 6 months, plus or minus 6 months by medical examination, was working as a maid at the house of the accused/Respondent No.1 from 29-5-2005. The alleged incident took place on the intervening night of 11/12-10-2005 at about 00.30 hours when the accused was alone in the house. On the next day, the victim girl left the house at about 13.00 hours in his absence and after doing her work, and went to the house of a neighbour by name Lawrence Fernandes and took the duplicate key from him, locked the house and returned the keys to him and went away without telling him anything as to where she was going. The victim girl then went to the house of Mrs. Kiran Kamat, a reporter of Goa Dhoot and asked her if she could give her shelter for two days. The said Mrs. Kiran Kamat phoned Mr. Laxman Joshi, the chief editor of

Goa Dhoot and conveyed to him as to what had happened. Laxman Joshi went to the house of the said Mrs. Kamat and saw the girl was frightened and after seeking some details from her returned to his Office and phoned Panaji Police Station at about 16.15 hours. The said Laxman Joshi told the victim girl that she should tell all that had happened to the Police and the Police shoul d take her to her parents. Presumably on being informed by Laxman Joshi, P.S.I. Parab deputed lady Police Constable Raquel Dias to bring the victim girl and accordingly she was brought to the Police Station. By then the intervention of some of the members of the applicant was sought and the statement of the victim girl was taken down by the Police Inspector of Women Police Station at Panaji and who subsequently filed a formal complaint against the accused. The statement of the victim girl was recorded in the presence of two of the members of the applicant. It was also subsequently recorded under Section 164 of the Code(Code of Cr.P.1973) on 25-10-2005 and there is no dispute that the victim girl has given the same version in the said 164 Statement as was given by her earlier on 12-10-2005 when her statement was recorded by the P.I. Women Police Station at Panaji in the presence of two of the members of the

applicant namely Smt.Nishtha Dessai and Smt. Audrey Pinto.

6. The relevant portion of the statement of the victim girl could be reproduced. It is as follows:-

"On 11-10-2005 at about 23.30 hours, after finishing all my work and after having dinner I went to my usual place to sleep and the door of my room was open and Mr. Sinha(the accused) was watching T.V. I was fast asleep and at about 00.30 hours on 12-10-2005 Mr. Sinha came to my room where I was sleeping and sat on the bed, he removed bed sheet from my body, lifted my skirt and was removing my panty and seeing him removing my panty, I screamed. I say that when he came to my room he switched on the lights and when I screamed he left the room saying that he had come to take a book as he had received a phone call from the Office. I could not go back to sleep. I sat leaning against the bookshelf put the latch on the door as I was frightened. Mr. Sinha returned and pushed the door. He tried to open the door and he asked me as to why I closed the door and why I have doubted him.

On 12-10-2005, Mr. Sinha in the morning told me not to tell this incident to his wife because nobody will believe me and would say that I was just trying to cause problem. He also asked if I did not have panties as he noticed while lifting my skirt that I had a torn one and asked whether I needed to buy some panties. At about 12.45 hours or so I left Mr. Sinha's house after locking the house by taking the keys from the neighbours and returning the keys back to them(uncle). I did not take keys from the house of Mr. Sinha. I left the house. I went to the neighbour's house(aunty) who is staying in the second building. From the place where I was working, I asked that aunty if I can work for her as a maid. Aunty said that she does not know and she closed the door. After some time one uncle came while I was outside the house and the said uncle phoned the Panaji Police and the Panaji Police came to my help. At that time I was outside aunty's building. Mr. Sinha's driver saw me and started asking where I had gone and that Mr. Sinha is searching for me. Mr. Sinha's driver called Mr. Sinha and Mr. Sinha came down and was talking to the Police. The Police told him to come to the Police Station if he wanted to talk."

7. In the reply filed to the application for condonation of delay, on behalf of the accused, it is stated that the applicant has no locus standi to file the present application for condonation of delay because the applicant does not have the locus to file criminal revision application itself. It is also stated that no sufficient cause has been made out to justify the condonation of delay. It is further stated that the action of the applicant is not bona fide inasmuch as the applicant has also not disclosed that it has challenged any other order of discharge or acquittal passed by the Children's Court and if so in how many cases such orders have been challenged, and, that takes me to examine whether the revisional jurisdiction of this Court should be exercised at the instance of the applicant.

8. On behalf of the applicant, two submissions have been made. The first is with reference to Section 32(k) of the Goa Children's Act, 2003(Act, for short) and it is submitted that since a child's testimony or statement is required to be recorded in the presence of a social worker/Counselor as provided under Clause (k) of Section 32, that gives sufficient locus to the applicant to file the present revision. On the other hand, it is submitted on

behalf of the accused, that the applicant could complain only in case the said provision of Clause (k) of Section 32 of the Act was not complied with and as far as this case is concerned, it was admittedly complied with. On behalf of the applicant, it is next submitted that the applicant is an organization concerned with the rights and protection of children and is placing the facts before this Court to show that there has been gross miscarriage of justice and therefore this Court ought to exercise its revisional jurisdiction to set aside the order of the learned Children's Court which has caused miscarriage of justice so that the majesty of law prevails. It is also submitted on behalf of the applicant that the victim girl is an illiterate person and was working at the house of the accused and she has no parents in this State to spouse her cause and being so this Court ought to exercise its jurisdiction to prevent miscarriage of justice which has taken place by the discharge of the accused by the impugned Order. On behalf of both the parties reliance has been placed on various authorities.

9. In the case of **Damodar Pednekar** v. **Umakant Naik and another**(2006(2) Goa L.R. 83) this Court held that a private

party has no right of appeal and it is the State alone who has been conferred with the right of appeal. This view also finds support in the case of **Jagbir and another** v. **State of Punjab** (1998 Cri.L.J. 4588). This decision is of no assistance to the case of the accused, as far as the facts of the case is concerned. Reliance is also placed on the case of **Shashi Kumar Goyal** v. **State and others**(2002(1) Crimes 501) wherein the Delhi High Court held that a revision at the instance of the brother of the complainant was not maintainable in a case where the accused was prosecuted after filing a charge-sheet. This decision is also of no help to the case of the accused. That a complainant i.e. first informant could file a revision is a position which has been accepted by the Apex Court in the case of **Jagbir and another** v. **State of Punjab**(supra).

10. In the case of **Pratap** v. **State of U.P. and others** ((1973) 3 SCC 690), the Apex Court speaking through three learned Judges has held that the power under Section 439 Cri.P.C.(now Section 397) is one which the High Court can exercise suo motu and all that a person filing a revision petition under that Section does is to draw the court's attention to an

illegal, improper or incorrect finding, sentence or order of a subordinate Court. The Apex Court has further held that the power of revision in criminal cases vesting in the High Court, though wide and also exercisable suo motu is a power which, generally speaking, is narrower and more limited than its appellate power, though in certain respects it has a somewhat wider scope. It is discretionary and cannot be invoked as of right such as is the case of appellate power. Broadly stated, the object of conferring revisional power is to clothe the highest court in a State with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. The error or defect may arise from misconception of law, irregularity of procedure, misreading of evidence, misapprehension or misconception about law or facts, mere perversity or even undue hardship or leniency. The real core of this power is that its exercise is justified only to set right grave failure of justice and not merely to rectify every error however inconsequential. The Apex Court has also stated that the High Court ordinarily should be disinclined to interfere with the orders of subordinate Criminal Courts in which the State is the prosecutor at the

instance of private parties except where for some exceptional reason it considers proper to do so in the larger interests of justice.

11. In **Kaptan Singh** v. **State of M.P.**(AIR 1997 SC 2485) the High Court had entertained a registered letter sent by the grandfather of the deceased, in a case where the accused was acquitted .It was treated as revision and allowed with direction to pass a fresh judgment or if need be to hold a retrial .The Apex Court referring to several of its decisions ,including **Chinnaswamy Reddy** v. **State of A.P.**(AIR 1962 SC 1788) observed that though it is open to the High Court to set aside an order of acquittal at the instance of the private parties the revisional jurisdiction should be exercised only in exceptional cases when there was some glaring defect in the procedure or there was a manifest error on a point of law and consequently there had been a flagrant miscarriage of justice. The Apex Court further stated that it was not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies but indicated some cases which would justify the High Court to interfere with an order of acquittal in revision.

The cases so indicated are; where the trial Court has no jurisdiction to try the case but has still acquitted the accused or where the trial Court has wrongly shut out evidence which the prosecution wished to produce or where the appeal Court has wrongly held evidence which was admitted by the trial Court as not admissible or where material evidence has been overlooked either by the trial Court or by the appeal Court or where the acquittal is based on a compounding of an offence, which is invalid under law.

12. Section 397 of the Code confers revisional power on this Court to examine the correctness, legality or propriety of any order passed by an inferior Criminal Court and, if it finds that the order is not correct or is illegal or improper, it can exercise any of the powers conferred on a Court of appeal. This Court possesses a general power of superintendence over the actions of Courts subordinate to it. On its administrative side this power is known as the power of superintendence. On the judicial side it is known as the power of revision. The High Court can at any stage, of its own motion if it so desires, and certainly when illegalities or irregularities resulting in injustice are

brought to its notice, call for the records and examine them for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceeding of such Court. As already seen, a charge-sheet against the accused was filed at the instance of the State after the statement of the victim was recorded. This revision is certainly not filed by the said victim girl but is filed on her behalf by the applicant who claims to have interest to protect the children and their rights. Strictly speaking the applicant would not have a right to file the present revision. No such right can also be conceded in their favour only because Section 32(k) provides that the testimony or a statement of a child should be recorded in the presence of a social worker or a Councilor. Nevertheless it is to be seen that the applicant is concerned for the victim girl who is illiterate and who was working as a maid in the house of the accused and whose parents are stated to be in the State of Bihar. Obviously, the victim girl has none to look after her interests after she was compelled to leave the house of the accused in the circumstances stated by her. In such a situation when an organization like the applicant knocks the doors of the Court alleging that the

impugned Order had caused gross miscarriage of justice, it is the duty of this Court to examine the correctness of the order of the learned Children's Court under its powers of revision. It certainly will not advance justice in case this Court refuses to exercise its jurisdiction only because the applicant has no locus to challenge the impugned Order. It is also to be noted that the applicant is spousing the cause of an illiterate victim girl who has no one to look after her and though the State initially spoused her cause ,now has chosen not to follow it up. The interests of a minor illiterate child who has none to look after her are pitted against an editor of a leading newspaper and therefore this is an exceptional case which requires , that in larger interest of justice, the powers of revision are to be exercised. This is all the more reason for the Court to exercise its jurisdiction and find out whether the impugned Order has resulted in miscarriage of justice.

13. The accused has been discharged under Section 354 I.P.C. and under Section 7(5)(c) and Section 8(2) of the Goa Children's Act, 2003. As far as Section 7(5)(c) of the Children's Act, 2003 is concerned learned Counsel on behalf of the

applicant has conceded that the discharge of the accused under the said Section could be justified since the age of the victim girl has been held to be 14 years and 6 months, plus or minus 6 months. However, it has been submitted on behalf of the applicant that the learned Sessions Judge could not have certainly viewed the statement of the victim girl with suspicion so as to disbelieve her at the stage of framing of charge. It is submitted that the statement of the victim girl had to be accepted at its face value and once it was so accepted it was sufficient to prove the ingredients of Sections 554 as well as 8 (2) of the Goa Children's Act, 2003. On the other hand, it has been submitted on behalf of the accused, by the learned Senior Counsel, that the victim girl after the alleged incident continued to be in the house of the accused but left the house only at about 13.00 hours of 12-10-2005 and did not even narrate the incident or state as to what the accused had done to her to the first persons she met namely the said Lawrence Fernandes or the said Kiran Kamat etc. and her narration of the incident came about only after the applicant intervened and her statement was recorded subsequently implicating the accused. It is submitted by the learned Senior Counsel that considering the aforesaid

facts, the ratio laid down by the Apex Court in the case of **Union of India** v. **Prafulla Kumar Samal and another**(AIR 1979 SC 366) was clearly followed and applied to the facts of the case by the learned Children's Court.

14. The Apex Court in the case of **Union of India** v. **Prafulla Kumar Samal and another**(supra) has stated that the test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, it will be fully within his right to discharge the accused. The Apex Court has further stated that the Court at the stage of Section 227 of the Code is required to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

15. The parameters required to be followed and applied at the stage of framing of charge are now well settled with several decisions of the Apex Court. In the case of **State of Maharashtra and another** v. **Som Nath Thapa and others** ((1996) 4 SCC 659), the Apex Court speaking through three learned Judges, stated that at that stage, the Court is required to consider the question of framing of charge by applying the test of a prima facie case. The Court further held that a more clear statement on the law would be that if there are grounds for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists and so frame a charge against him for committing that offence and that the Court on the basis of material on record should come to the conclusion that the commission of the offence is a probable consequence and if that is the case, a case for framing of charge exists. To put it differently, observed the Supreme Court, that if the Court were to think that the accused might have committed the offence, it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence and at the stage of charge, the probative value of the materials cannot be gone into and the materials brought on

record by the prosecution have got to be accepted as true at that stage. (emphasis supplied)

16. In **Shree Atyachar Virodh Parishad** v. **Dilip Nathumal Chordia and another**((1989) 1 SCC 715) the Supreme Court referred to Section 227 of the Code and referred to the expression "ground" in Section 227 and observed that the "ground" in the context is not a ground for conviction, but a ground for putting the accused on trial and therefore the Court need not undertake an elaborate inquiry in sifting and weighing the materials and all that the Court is required to consider is whether evidentiary material on record, if generally accepted, would reasonably connect the accused with the crime. Again, in the case of **State of Maharashtra** v. **Priya Sharan Maharaj and others**((1997) 4 SCC 393) the Hon'ble Supreme Court stated that at the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence, and the Court may, for this limited purpose, sift the evidence and it cannot be expected even at that initial

stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. At the stage of framing of charge, the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is no sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. In the case of **State of M.P.** v. **S. B. Johari and others**((2000) 2 SCC 57), the Apex Court has reiterated that at that stage, the Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. In **State of Orissa v. Debendra Nath Padh**i(2004 AIR SCW 6813) the Supreme Court spoke through three learned Judges has further reiterated that at the stage of framing of charge roving and fishing inquiry is impermissible .(emphasis supplied)

17. The gravamen of the allegation made by the victim girl against the accused was that the accused came to her room where she was sleeping and sat on the bed, he then removed the

bed sheet from her body, lifted her skirt and was removing her panty and seeing him removing her panty she screamed.

18. The learned Children's Court has not stated that the said allegation did not attract the ingredients of Section 354 I.P.C. but the learned Children's Court chose to look at the said allegation with suspicion .The learned Children's Court committed a grave error by looking at the said statement of the victim girl with suspicion so as not to believe her. The learned Children's Court entirely lost sight of the fact that at the stage of framing of charge probative value of the materials cannot be gone into and the materials brought on record by the prosecution had to be accepted as true at that stage, as stated by three Judge Bench decision of the Hon'ble Supreme Court in the case **State of Maharashtra and another** v. **Som Nath Thapa and others**(supra). Whether the victim girl had narrated the alleged incident to the very first person she met or whether her statement was an outcome of the discussion the victim girl might have had with the persons who interviewed her from the applicant's organization are matters pertaining to the realm of appreciation of evidence and could not have been gone into at

the stage of framing of charge. The victim girl has consistently maintained her statement subsequently recorded u/s 164 of the Code which ought to have been taken note of at the stage of framing of charge.

18. Section 354 I.P.C. deals with assault or criminal force to woman with intent to outrage her modesty and provides that whoever assaults and uses any criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. This Section is enacted in the interest of decency and morals. An indecent assault upon a woman being an index of a depraved soul often causes intense shame and suffering to the sufferer and arouses the just indignation both of the person assailed and of the public. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex, says the Supreme Court in **Raju Pandurang Mahale** v. **State of Maharashtra**(2004 AIR SCW 1071). The Hon'ble Supreme Court further says that the modesty in this Section(354) is an attribute associated with

female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a female; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. The Supreme Court referring to the dictionary meaning of modesty in Shorter Oxford Dictionary and the interpretation given to that word by that Court in **State of Punjab** v. **Major Singh**(AIR 1967 SC 63) held that ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman. When the allegation was that the accused, in the absence of any inmates of the house, in the middle of the night, had come and sat on the bed where the victim girl was sleeping, removed the bed sheet from her body and then her skirt and then was removing her panty was sufficient to show that the accused had prima facie committed the offence under Section 354 I.P.C.

19. The learned Children's Court has also come to the conclusion that the ingredients of Section 8(2)of the Act were not attracted. Section 8(2) of the Act provides that whosoever commits any child abuse or sexual assault as defined under the Act shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to fine of Rs.1,00,000/-. The expression "Child abuse" has been defined in Section 2(m) of the Children's Act, 2003 and "Sexual Assault" has been defined in sub-clause(ii) of Clause (y) of Section 2 of the said Act. Sub-Clause(ii) states that sexual assault which covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing of threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language. The controversy raised is in relation to the expression "sexual touching with the use of any body part or object". On behalf of the accused, the learned Senior Counsel contends that the allegation of the victim girl does not amount to sexual touching as defined in sub-clause(ii) of Clause (y) of Section 2 of the said Act. In my view when a male person lifts a skirt of a

female person and then tries to remove her panty without her consent it has got to be considered as sexual touching which is covered by the expression "sexual assault" as defined in sub-clause(ii) of Clause(y) of Section 2 of the Children's Act, 2003.

20. In my view, the learned Children's Court was not at all justified in discharging the accused under Section 354 I.P.C. and Section 8(2) of the Children's Act, 2003.

21. As a result, the revision petition is hereby allowed and the impugned Order of the learned Children's Court dated 7-4-2006 is hereby set aside. The learned Children's Court is directed to frame a charge against the accused under Section 354 I.P.C. and Section 8(2) of the Goa Children's Act, 2003 and try the accused in accordance with law. Criminal Misc. Application No. 324/06 and Criminal Revision Application under stamp no. 2332/06 shall stand disposed of on the above terms.

N. A. BRITTO, J.

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